IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL NO.4 OF 2007
IN
ARBITRATION PETITION NO.373 OF 2006

Shubhalaxmi Gas Agency, Solapur ..Appellant.
(Orig. Petitioner)

Vs.

The Bharat Petroleum Corporation Ltd. ..Respondent.

....

Shri. Ramdas P. Sabban for the Appellant.
Ms. Sheeja John i/b M/s. M.P. Savla & Co. for the Respondent.

....

CORAM: **R. M. S. KHANDEPARKAR, &**
DR. D.Y. CHANDRACHUD, JJ.

11th January, 2007.

P.C. :

1. Heard the learned advocate for the Appellant. Perused the impugned order and copies of the records produced before us.

2. The Appellant challenges the order dated 5th September, 2006 passed in Arbitration Petition No.373 of 1006 on the ground that the Learned Single Judge failed to take into consideration the provisions of Clause 28(a) of the agreement between the parties while rejecting the Arbitration Petition filed by the Petitioner. It is

sought to be contended on behalf of the Appellant that once the Appellant had remedied the breach by revoking the power of attorney dated 28th July, 2004 and returning a sum of Rs.5 lacs to the person in whose favour the said power of attorney was executed, the breach of Clause 23(c) which was stated to be committed by the Petitioner was remedied and considering the provisions of Clause 28(a), the Respondent ought to have exercised the jurisdiction and ought to have given the Appellant an appropriate opportunity of continuing with the distributorship.

3. Clause 23(b) of the agreement between the parties reads thus :

> "Clause 23(b) – It shall be a paramount condition of the agreement that the Distributor himself (if he be an individual) or both the partners of the distributor's firm (if the Distributor is a partnership firm consisting of two partners only) or the majority of the partners of the Distributor's firm (if the Distributor is a firm consisting of more than two partners) or the majority of the Office Bearers / Elected Members of the Distributors Cooperative Society (if the Distributor is a Cooperative Society) Managing/ Whole time or Elected Directors (if the Distributor is a private limited company) as the case may be shall take active part in the management and running of the Distributorship and shall personally supervise the same and shall not under any circumstances do so through any other person, firm or body."

4. Clause 28(a) of the agreement reads thus :

> "28) Notwithstanding anything to the contrary herein contained, the Corporation shall also be at liberty at its entire discretion to terminate this Agreement forthwith upon or at any time after the happening of any of the following events, namely;
>
> a) If the Distributor shall commit a delay, breach or default of any of the terms, conditions, covenants and stipulations contained in the Agreement and fail to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard;"

5. The Learned Single Judge upon hearing the parties and on going through the records has clearly held that Clause 28 is not attracted in relation to the breach of the nature committed by the Appellant. The Learned Single Judge has also observed that the distributorship was given to the Petitioner as he belonged to the Scheduled Tribe and in terms of the agreement the Petitioner was required to manage the agency by himself. However in violation of the said obligation under the agreement between the parties, the Petitioner accepted a sum of Rs.5 lacs and assigned the entire agency and the business to Shri. Jaypal Govindswami Naidu under the guise of the execution of a deed of power of attorney and thereby sought to defeat the public policy on the basis of which the

concession was granted to the Appellant in the form of distributorship under the agreement between the parties.

6. Perusal of the records before us clearly justifies the finding arrived at by the Learned Single Judge. A bare perusal of the alleged deed of power of attorney which was executed by the Appellant in favour of one Jaypal Govindswami Naidu apparently discloses that Shri. Naidu has been referred therein as the Vendee. It is true that mere nomenclature used for addressing a party to an agreement would not decide the real nature of the transaction between the parties. However, taking into consideration the entire deed, it is apparent that the entire business of distributorship was assigned and transferred in favour of Shri. Naidu in consideration of Rs.5 lacs. The deed clearly reads that “My health does not permit me to devote the above work & I have to spend some time to many social activities, the Vendee for the above said Subh Laxmi Gas Agency he had paid total amount of Rs.5,00,000/- (Rs. Five Lacs) as financial help” and further “thereby I have given non revocable Power of attorney in the name of Subh Laxmi Gas Agency and in the capacity of proprietor of above said Gas Agency by entrusting all powers to, Vendee Shri. Jaypal

Govindswami Naidu, R/o. Solapur" and further that while performing the above work "The above shop's wholesale & purchase Godown & official work to be performed with ownership right, to perform the banking, Govt/ Semi Govt. work daily, all transactions, to pay the bill, to prepare the bill, to recover the bill, to write the account and supervise over it" and also that " while performing the above work to follow up & if necessary to apply for financial institution for loan & accept it as required." The plain reading of these terms obviously discloses that the Appellant under the guise of executing the deed of power of attorney had virtually conveyed the entire business in favour of Shri. Jaypal Govindswami Naidu for consideration of Rs. 5 lacs. As already seen above, Clause 23(a) of the agreement between the parties while granting the distributorship clearly requires active management and running of distributorship by the Appellant and his personal supervision over the entire business. While execution of the deed on acceptance of a sum of Rs. 5 lacs though termed as "financial help", the same coupled with the categorical statement about inability on the part of the Appellant to devote his time for the said business on account of his commitment to the social activities, obviously discloses that the finding arrived at by

the Learned Single Judge recording the complete assignment and transfer of the business in favour of Shri. Jaypal Govindswami Naidu, cannot be found fault with.

7. As regards the contention that the Appellant had remedied the breach by revocation of the power of attorney and by returning the sum of Rs.5 lacs, it is pertinent to note that apart from the statement regarding the return of the said amount and production of the cancellation of the deed of power of attorney, admittedly nothing was placed before the arbitrator and even before the Learned Single Judge to disclose that the Appellant had himself resumed the supervision and had participated in the business of Subh Laxmi Gas Agency consequent to the revocation of the alleged power of attorney and return of the sum of Rs.5 lacs. Once the Appellant in no uncertain terms had admitted in the deed while accepting a sum of Rs.5 lacs that he was unable to devote his time to the business of the agency and further that he had commitment towards social activities and on that count also he is unable to pay attention to the business of the said agency, it was absolutely necessary for the Appellant to place on record before the Arbitrator the relevant material which would disclose that

he had commenced attending the business of the agency immediately on revocation of the power of attorney and further alleged refund of Rs.5 lacs by Shri. Naidu to the Appellant. In that connection the attention was sought to be drawn to a letter dated 11th April, 2005 which is reply to the show cause notice issued by the Respondent. All the averments therein refer to the period much prior to the date of revocation of the alleged power of attorney. Much stress was laid on Clause 2(d) of the said letter which refers to the certificates issued by the Manager of the Bank of Maharashtra, Sakhar Peth, Solapur while contending that the Appellant had personally started attending the business. Undoubtedly, in the said clause (d) of paragraph 2, it has been stated that the Appellant had been personally taking care of the "banking transaction". The business of the distributorship does not consist solely of business transactions. Merely because the Appellant claimed to have taking care of all the banking transaction, even assuming that it is true, that itself would not amount to participating personally in the distributorship business as is required under the terms of Clause 23(a) of the agreement and hence, it cannot be said by any stretch of imagination that even after the revocation of the alleged deed of power of attorney, the

Appellant had indeed remedied the breach in the manner which was required to be remedied. It is not in dispute that the Appellant did commit the breach. The only contention which is sought to be advanced now is that in exercise of powers under Clause 28(a), the Respondent ought to have condoned the said breach and ought to have given opportunity to the Appellant to continue with the business.

8. Perusal of clause 28(a) would disclose that it is essentially in the discretion of the Respondent to allow the distributor to continue with the business on breach being remedied. As already observed above, the Learned Single Judge has rightly held that the breach of the nature which has been committed is not covered by the discretionary power of the Respondent under Clause 28 so that it can be condoned and the distributor can be allowed to continue with the business. As rightly observed by the Learned Single Judge the distributorship was allotted to the Appellant in furtherance and in compliance of the public policy of providing sufficient opportunity in the business activities to the down trodden people and more particularly those belonging to the scheduled tribe. If the people availing of the benefit of such

opportunity under such policy and scheme are allowed to assign the benefits enjoyed thereunder in favour of a third party, it would result in defeating the very scheme and the policy under which such benefits are made available to the people of scheduled tribe. Considering the same, the Learned Single Judge was justified in holding that the provisions of Clause 28(a) cannot be attracted in relation to the breach committed by the Appellant. Besides, as observed above, in the case in hand the Appellant had not completely remedied the breach, in the facts and circumstances of the case.

9. In relation to the costs, the learned Advocate for the Appellant has stated that the Arbitration Petition is a statutory remedy and therefore the Learned Single Judge erred in awarding costs against the Appellant. However, a statutory remedy has to be exercised upon proper application of mind and not as a matter of course. A person who has availed the benefit under a scheme framed for the benefit of the scheduled tribe cannot be allowed to be misused so that the entire object behind it is defeated. The persons acting to the contrary, merely because they have availed the statutory remedy, despite being responsible for attempting to

defeat the very object of such scheme, if penalized by awarding costs cannot justifiably complain against such penalty levied by the Court. Hence we do not find any justification for interference in the order awarding costs, while dismissing the Arbitration Petition.

10. For the reasons stated above, there is no case made out for the interference in the impugned order and hence the Appeal fails. The Appeal is dismissed. There shall be no order as to costs.

(R. M. S. KHANDEPARKAR, J.)

(DR. D.Y. CHANDRACHUD, J.)